No. 97-1235

In the

Supreme Court of the United States

October Term, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY LTD., AND MONTEREY-DEL MONTE DUNES CORP.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the 9th Circuit

BRIEF OF THE STATES OF NEW JERSEY, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OREGON, RHODE ISLAND, TENNESSEE, VERMONT, VIRGINIA, WASHINGTON, WESTVIRGINIA AND THE TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Recognizing this Court's consistent admonition that the Fifth Amendment's takings clause "[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)), the *amici* states have established policies and procedures to balance fairly the rights of individual property owners and the interests of the public. This case raises both procedural and substantive issues that threaten the delicate balance the 30 *amici* states and territories have labored to maintain.

Specifically, this case first raises the issue of whether a right to jury trial exists under 42 U.S.C. § 1983 or the Seventh Amendment on liability issues in federal takings cases. If such a right is determined to exist, the ruling will substantially impact *amici* states that have established state court procedures to provide just compensation consistent with this Court's decision in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). Those state court procedures do not generally provide a right to jury trial on liability issues, although many states have juries decide the amount of compensation due if a taking has occurred. Establishing such a right in federal court may defeat the preclusive effect of the state court adjudication. This would lead to substantial additional litigation of takings claims in federal court and would permit federal juries to reevaluate the decisions of state courts, legislatures and administrative agencies on matters within their expertise and authority.

This case also raises the question of the appropriate standard for reviewing state legislative enactments and administrative decisions that do not involve a physical intrusion or exaction in order to determine whether such actions amount to a taking. Although states have traditionally been afforded deference in

exercising their police powers to further the public interest, the decision below alters the traditional rule and inserts federal juries into the role of second-guessing state legislatures and administrative agencies. While a heightened standard may be appropriate where government exacts a condition comparable to a physical taking in exchange for government approval, the expertise and judgment of state officials attempting to rationally balance development and environmental protection should be respected.

For example, over one million acres of land in the State of New Jersey -- almost one quarter of the state -- have been designated as protected pinelands. The Pinelands National Preserve, originally established pursuant to federal law, 16 U.S.C. § 471i, overlies the vast Cohansey aquifer, an important source of drinking water not only for New Jersey, but for neighboring states as well. See generally *Gardner v. New Jersey Pinelands Comm'r,* 593 A.2d 251 (N.J. 1991). New Jersey also contains hundreds of miles of sensitive coastal property and freshwater wetlands. At the same time, New Jersey is the most densely populated state in the union. The State's unique concerns have led to a complex scheme of regulation designed to protect these sensitive habitats but permit sensible and appropriate development. If a particular property owner claims to be unfairly burdened by a legislative enactment or administrative determination, remedies exist to review the legality of these acts, to determine if they constitute a "taking," and, if so, the appropriate amount of compensation. Other *amici* states have comparable restrictions and remedies that have been carefully fashioned by elected officials and local experts. Their considered judgment and authority to act in the interest of their citizens should not be subject to second-guessing by a federal jury.

SUMMARY OF ARGUMENT

1. Neither 42 U.S.C. § 1983 nor the Seventh Amendment guarantees a jury trial on liability in regulatory takings cases in federal court. The language of the statute does not support an interpretation that Congress intended to create a right to jury trial for all cases brought under § 1983. Nor does the Seventh Amendment confer such a right. The Seventh Amendment was intended to preserve the right to jury trial in cases where such a right existed at common law. While the concept of "regulatory takings" did not exist at common law, it derives from cases brought pursuant to government's power of eminent domain. As it is well-established that no right to jury trial on liability issues exists in eminent domain proceedings, *United States v. Reynolds*, 397 U.S. 14 (1970), no such right exists for inverse condemnation or regulatory takings cases.

Moreover, a decision finding a right to jury trial on liability in such cases would unfairly and unnecessarily complicate the litigation of takings disputes. Finding a right to jury trial on liability would undermine this Court's decision in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson*, this Court ruled that a federal takings claim is not ripe until a plaintiff has fully litigated on the state level (1) how the regulation affects the property in question to determine whether a taking has occurred; and (2) the amount of compensation due if the regulation or decision is deemed to constitute a taking. Only then can a federal plaintiff know whether the property has been taken and whether just compensation has been denied, thus giving rise to a federal cause of action. Generally, the federal courts give preclusive effect to issues fully and fairly litigated in the state court proceedings. If there is a right to a jury trial in federal takings cases, but none provided in the state proceedings, such preclusive effect may not be afforded. Thus, the state may be forced to relitigate the very issues litigated fully in state court. Such duplicative litigation would undermine the decision in *Williamson*, as there is no logical purpose to require ripening

of a claim in state court, or for the state to provide a mechanism for doing so, only to relitigate completely in federal court. Moreover, relitigation would essentially transform the federal court into an appeals court for state cases, thus compromising state sovereignty in an area of crucial state interest.

2. Absent a threshold finding that the government's action is arbitrary and unreasonable or for a purely private purpose, the court's view of the wisdom of the legislative or executive action is not relevant to whether there is a "taking" of property. The "taking" analysis should focus on the degree to which the government action interferes with the use of the property or the essential strands in the "bundle of rights" associated with property ownership.

This rule is consistent with historical jurisprudence in taking cases. This Court has, since *Agins v. City of Tiburon*, 447 U.S. 255 (1980), stated that there are two separate analyses to conduct in determining whether government action constitutes a taking -- whether the government action substantially advances a legitimate state interest, and the degree to which it eliminates economically viable use of the land. However, the takings analysis that has been applied by this Court since *Agins* has focused almost exclusively on the second part of the test. State *amici* assert that this focus is appropriate, as the government's purpose is relevant to the constitutionality of its action, but does not determine whether that action constitutes a "taking." Thus, while a threshold question must be posed to ensure that the government's action is not arbitrary, unreasonable or for a purely private purpose, the takings analysis has and should focus on whether the effect of the government's action is such that the cost should be borne by society as a whole. Except where government utilizes its power to exact a physical taking as a condition of regulatory approval, the Court's review of the wisdom of the legislative or executive determination has been deferential. That deference should be maintained as it fairly balances the interests of the government and the individual property owner and respects the

expertise of administrative agencies and the authority of state legislatures.

3. Thus, the "rough proportionality" standard established for exaction cases in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), should not be extended to regulatory takings cases. To date, this Court has only applied rough proportionality where there is an exaction of property. This approach evolved because exaction is viewed as a way around eminent domain, and its effect on the bundle of property rights compares to that of a physical taking. The same is not true of regulatory takings unless they "go too far" and destroy all economically viable uses of the land. Because an exaction is a "condition substituted for the prohibition," and implicates the doctrine of "unconstitutional conditions," the Court has required a greater showing of a nexus between the condition and the approval sought. Absent such an effort by the government to exact such a condition, a nexus and "rough proportionality" should not be required.

ARGUMENT

I. THERE IS NO RIGHT TO A JURY TRIAL ON LIABILITY IN REGULATORY TAKINGS CASES IN FEDERAL COURT

The court below found that 42 U.S.C. § 1983 guarantees a right to jury trial on both liability and damages issues in inverse condemnation proceedings. This ruling is inconsistent with the plain language of the statute as well as this Court's extensive jurisprudence on the Seventh Amendment's application to newly created statutory and legal rights. Finding a right to jury trial for liability issues would contravene existing Seventh Amendment law and effectively undermine existing Supreme Court precedent regarding the proper litigation of regulatory takings cases.

A. Neither 42 U.S.C. § 1983 Nor the Seventh Amendment Guarantees the Right to a Jury

As acknowledged by the Ninth Circuit in the decision below, 42 U.S.C. § 1983 is silent as to whether there is a right to jury trial for claims brought pursuant thereto. (Pet. App. 7). Although elsewhere Congress clearly expressed its intent to provide a right to jury trial in civil rights cases, 42 U.S.C. § 1981a, it did not do so in § 1983. This creates a powerful negative inference that § 1983 was not intended to create a right to jury trial. See *Lindh v. Murphy*, 117 S. Ct. 2059, 2075-76 (1997) (inferring negative implication from disparate provisions within single statute).

Finding no assistance in the plain language of § 1983, the Court below proceeded to search for other signs of Congressional intent. With little or no analysis, the Court concluded that it was "logical" to assume that Congress intended to provide a right to jury trial in actions "at law" brought pursuant to the statute, but not those brought "in equity." (Pet. App. 7-8). To determine whether an action for

inverse condemnation was an action "at law" for which a jury trial must be granted, the Court looked to Seventh Amendment jurisprudence. The Court concluded that inverse condemnation was an action "at law," based primarily on the fact that compensatory damages were sought. (Pet. App. 9).

In reaching its conclusion that 42 U.S.C. § 1983 was intended to create a right to jury trial in inverse condemnation cases, the Ninth Circuit rejected the arguments of the City of Monterey and the State of California that inverse condemnation proceedings are comparable to eminent domain proceedings for which no right to jury trial on liability is afforded. The court reasoned:

> Eminent domain proceedings, however, are actions at law. Such proceedings are not tried before a jury because the United States traditionally is a party. Thus, merely because inverse condemnation actions are similar to eminent domain actions, does not necessarily lead to the result that they are not "actions at law" triable by a jury. (Pet. App. 8-9 (citations omitted)).

This reasoning is plainly erroneous. First, it is incorrect that there is no right to jury trial in eminent domain proceedings because "the United States traditionally is a party." This Court's decisions for over 100 years have repeatedly affirmed that there is no right to jury trial on liability in eminent domain proceedings in cases involving condemnation at all levels of government. See, *e.g.*, *Dohany v. Rogers*, 281 U.S. 362 (1930) (state highway commission); *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557 (1898) (state-created corporation); *Long Island Water Supply Co. v. City of Brooklyn*, 166 U.S. 685 (1897) (city); *Bauman v. Ross*, 167 U.S. 548 (1897) (District of Columbia).

Second, the Ninth Circuit decision erroneously applies Seventh Amendment jurisprudence. This Court has consistently held that the Seventh Amendment was intended to preserve the

right to jury trial in cases for which such a right existed at common law in 1791. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Where the claim at issue was not found at common law in 1791, a court should determine whether the claim is more similar to those tried in courts of law or those tried in courts of equity in the 18th Century. *Tull v. United States*, 481 U.S. 412 (1987). This analysis requires an examination of the nature of the action and of the remedy sought. *Id.*

Here, the court below correctly recognized that neither § 1983 nor inverse condemnation were actions cognizable in 1791. The court then dismissed the similarity to condemnation, from which inverse condemnation derives, in favor of an analogy to trespass. (Pet. App. 8-9). Clearly, however, a comparison to eminent domain is most appropriate in determining whether a jury trial on liability is required under either § 1983 or the Seventh Amendment. Causes of action for regulatory takings are derived from the Fifth Amendment prohibition, made applicable to the states through the Fourteenth Amendment, against the condemnation of property without compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992), this Court recognized that the rule that property has been "taken" when a regulation deprives the owner of all beneficial use of the property derives from the principle "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." With respect to proofs and issues, state inverse condemnation cases are generally the same as traditional eminent domain proceedings. See *Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n*, 486 A.2d 330, 333-4 (N.J. 1985) (holding that the provisions of the Eminent Domain Act govern inverse condemnation cases). Indeed, in some states these actions are styled as mandamus proceedings aimed at requiring states to institute eminent domain proceedings. See, *e.g., Schaller v. State of Iowa*, 537 N.W.2d 738 (Iowa 1995). As it is clear that liability issues in eminent domain

proceedings are issues for which a jury trial is traditionally not required, no such right on liability issues in inverse condemnation cases should be created.

B. Creating a Right to Jury Trial in Federal Takings Cases Would Undermine the Decision in *Williamson* and Interfere with State Sovereignty

The creation of a right to jury trial in federal takings cases is not only inconsistent with the plain language of § 1983 and the Seventh Amendment, it would (1) undermine this Court's decision in *Williamson, supra*, 473 U.S. 172, and (2) violate principles of federalism by interfering with a state's administration of takings litigation in its own courts and by permitting federal juries to review state court judgments. For these reasons as well, the Court should decline to create a right to jury trial on liability in federal takings cases.

Finding a right to jury trial on liability in takings cases would threaten the sound administration of justice by undermining prior Supreme Court precedent regarding the proper litigation of such cases. In *Williamson*, this Court recognized that a federal takings claim is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." In addition, the Court held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

Many of the *amici* states have developed procedural remedies for property owners to challenge the government action, litigate whether such action constitutes a taking of the property at issue, and determine, if a taking has occurred, the amount of compensation that is just. For example, in New Jersey, a plaintiff may challenge a permit denial or regulation

by appealing final agency action to the Appellate Division of the Superior Court. See *N.J. Court Rule* 2:2-3. If the administrative decision is upheld, or the plaintiff does not challenge its validity, and the plaintiff believes that his or her property has been "taken," an action for inverse condemnation or in lieu of prerogative writ may be brought in the trial division of the Superior Court. See *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991); *Schiavone, supra*, 486 A.2d at 333-4; see also *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 422 (Ore. 1997) (setting forth Oregon's inverse condemnation procedure).

In such proceedings, issues of liability are determined by the court. N.J.S.A. 20:3-5. If the court finds that a taking has occurred, a panel of commissioners and ultimately a jury, if demanded, determine the amount of just compensation. *Van Dissel v. Jersey Central Power & Light Co.*, 438 A.2d 563 (N.J. 1981), *certif. den.*, 446 A.2d 141 (1982), *cert. granted and vacated on other grounds*, 465 U.S. 1001(1984); N.J.S.A. 20:3-12, -13; see also *Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla. 1988), *cert. denied*, 488 U.S. 870 (1988) ("the trial judge in an inverse condemnation suit is the trier of all issues, legal and factual, except for the question of what amount constitutes just compensation"). In other states, a writ of mandamus may be sought by the property owner to force the government agency to institute a condemnation action. See, *e.g., Schaller v. State of Iowa*, 537 N.W.2d 738 (Iowa 1995). In the mandamus action a judge determines whether a taking has occurred. If that question is answered in the affirmative, a compensation commission and jury ultimately fix the amount of just compensation. *Id.*; Iowa Code §§ 6B.4, 6B.21 (1992). Some other states permit either process, but in each process a judge will determine liability with a right to jury trial only if a taking has been found. See, *e.g., Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995). Other states vest both liability and compensation determinations in the discretion of state court trial judges. See

Spears v. Berle, 397 N.E.2d 1304, 1306 (N.Y. 1979); N.Y. Court of Claims Act §§ 8, 9.

If a property owner claims at the end of the state process that just compensation has been denied, the federal forum is then available for the litigation of the Fifth Amendment claim.[1] *Williamson*, 473 U.S. at 194-97. As a general matter, collateral estoppel is raised as a defense to preclude relitigation of the issues decided in state court. Disposition of this defense in the federal courts has varied depending on the particular circumstances of each case, although the courts have generally heeded this Court's requirement that full faith and credit be given state court decisions resulting from full and fair litigation of constitutional claims. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 473-4 (1982); *Allen v. McCurry*, 449 U.S. 90, 103-104 (1980). As a result, preclusive effect is often applied to state inverse condemnation decisions. See, *e.g., Palomar Mobilehome Park v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989).[2]

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[1] In this case, the Ninth Circuit determined in an earlier ruling that respondents' Fifth Amendment claim was ripe. *Del Monte Dunes at Monterey v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990). The court based its decision on a "limited futility exception" to the requirement that the landowner obtain a final decision from the administrative agency. *Id.* at 1501. The Court also found that the compensation element of respondents' claim was ripe because at the time the City rejected respondents' last development application, California had no mechanism for seeking compensation for a regulatory taking through an inverse condemnation action. *Id.* at 1507.

[2] Exceptions include cases where (1) a plaintiff has specifically reserved federal rights pursuant to *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), see, *e.g., Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992), or (2) the state court remedy is deemed to be insufficient, see, *e.g., New Port Largo, Inc. v. Monroe*

The states would not, of course, be required to alter their procedures and provide a right to jury trial in state court on liability if the Court upholds the Ninth Circuit decision in this case. *Minneapolis & St. Louis R.R. Co. v. Bombolis,* 241 U.S. 211, 217 (1916). However, a failure to do so would create uncertainty as to the preclusive effect of the state court judgment and potentially expose the state to full relitigation of the issues litigated in the state court proceeding. In *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), this Court held that granting preclusive effect to an equitable determination did not automatically violate the petitioner's Seventh Amendment right to jury trial even though the issue petitioners sought to relitigate was one to which they were entitled to a jury in federal court. However, in *Lytle v. Household Mfg.*, 494 U.S. 545 (1990), the Court declined to extend the holding in *Parklane*, and denied preclusive effect to equitable rulings that were rendered prior to the disposition of legal claims solely because of the erroneous dismissal of the legal claims on motions for summary judgment.

The Court in *Lytle* reiterated the holding of *Beacon Theaters v. Westover*, 359 U.S. 500, 510-511 (1959), that "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 494 U.S. at 550. See also *Parklane Hosiery*, 439 U.S. at 347 (Rehnquist, J., dissenting) ("developments in the judge-made doctrine of collateral estoppel, however salutary, cannot, consistent with the Seventh Amendment, contract in any material fashion the right to a jury trial that a defendant would have enjoyed in 1791"). Thus, liability issues decided by state court judges in condemnation

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County, 95 F.3d 1084, 1089 (11th Cir.1997), *cert. denied,* 117 S. Ct. 2514 (1997). See also *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1676 n.8 (1997) (noting that to satisfy *Williamson*, a plaintiff must seek compensation first through state inverse condemnation proceedings unless the state "does not provide adequate remedies for obtaining compensation").

proceedings would be of uncertain preclusive effect in subsequent federal takings cases if a right to jury trial is found to exist on liability for takings in federal court.

For many valid policy reasons, states may choose to continue to entrust liability issues in takings cases to a judge. As this Court has recognized, whether a particular question is one for the jury or the court may be based on a conclusion that "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller v. Fenton,* 474 U.S. 104, 114 (1985). As liability for takings presents complex legal issues, a state may appropriately determine that these issues should be addressed by a court. Submitting liability issues to the court promotes uniformity in regulatory takings cases, which many states view as essential so that local governments do not operate in a zone of uncertainty when regulating land use. See *Markman v. Westview Instruments, Inc.,* 517 U.S. 370, 390-91 (1996).

Yet if a state fails to provide a jury trial on liability, it will be faced with the possibility of having to relitigate identical issues in federal court. In essence, states may be punished for making valid policy choices regarding the state mechanism to address just compensation. Indeed, states may be punished for providing a remedy at all, as the absence of a remedy will assure litigation of these issues only once, even if in federal court. States attempting to manage this burgeoning field of litigation should not be forced to choose between the orderly adjudication of takings cases and the preclusive effect of the state adjudications.

Finding a right to jury trial on liability in federal takings cases would not only intrude upon a state's administration of its judicial system, it would improperly transform the lower federal courts into appeals courts for state cases. See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). A federal jury would be permitted to reevaluate the decisions of state courts and

administrative agencies in areas of crucial state interest. A federal plaintiff would get a "second bite of the apple" in the already crowded federal courts, and in a context where attorneys fees may be available if the jury reaches a different conclusion than the state court. See 42 U.S.C. § 1988; see also N.J.S.A. 20:3-26(c) (providing for award of fees and expenses to plaintiffs in inverse condemnation proceedings). In *Williamson* and elsewhere, this Court has recognized that state courts should initially determine how to balance private property interests and public needs. This recognition, which is fully consistent with comity and principles of state sovereignty, should not be undermined by recognizing a right to jury trial that is neither supported by the statute at issue nor by the Seventh Amendment.

II. THE TAKINGS CLAUSE SHOULD NOT BE INTERPRETED TO OVERRIDE THE USUAL DEFERENCE GIVEN TO STATE AND LOCAL LEGISLATURES AND AGENCIES

To establish that a government regulation or administrative action constitutes a taking of property, this Court has stated that the property owner must demonstrate that (1) the government's action fails to substantially advance legitimate state interests, or (2) that it deprives the property owner of all economically viable use of the land. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). With respect to the first prong of the *Agins* test, this Court has acknowledged that its cases "have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). This case provides an opportunity to clarify the proper standard for reviewing whether a government action substantially

advances a legitimate state interest and for placing that review in the proper context.[3]

The state *amici* submit that unless a threshold finding is made that the government's action is arbitrary and unreasonable or for a purely private purpose, the court's (or a jury's) view of the wisdom of the legislative or executive action is not relevant to whether there is a "taking" of property. While a review of the government's action is appropriate to ensure that property is not being taken for a private purpose or in an otherwise unconstitutional manner, the "taking" analysis itself should focus on the degree to which the government action interferes with the use of the property or the essential strands in the "bundle of rights" associated with property ownership. Such an analysis is consistent with the prior pronouncements of this Court and will provide appropriate deference to legislative and executive determinations in areas of state interest.

Although this Court has not specifically elaborated on this issue, a review of the historical treatment of the government purpose prong demonstrates that the standard we propose is consistent with this Court's prior rulings. In each case, the focus has been on the effect of the government action on the "bundle of rights" associated with property ownership. Except in cases where the government has utilized its power to exact a physical taking from the property owner in exchange for approval, see Point III, below, this Court has afforded deference to legislative and executive judgments. The Ninth Circuit's departure from this course has allowed a federal jury to substitute its judgment regarding the protection of the

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[3] The jury below did not specify whether it found that a taking had occurred (1) because the government's action "failed to substantially advance a legitimate state interest," or (2) because there was no economically viable use of respondents' land. The Ninth Circuit, therefore, reviewed whether the jury's verdict was sustainable on both theories. The questions for which *certiorari* was granted relate to the first possible basis for the jury's decision. (Pet. App. 6).

environment not only for the Monterey City Council, but for the California Department of Fish and Game and the United States Fish and Wildlife Service.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court first recognized that a regulation may go so far as to constitute a taking. In that case, the plaintiffs purchased only the surface rights to the property on which they built their home. The defendant coal company had sold them the property and, in doing so, specifically reserved all rights to mine the coal beneath the surface. When the defendant gave notice that it was to begin mining coal beneath plaintiffs' home, they sought to enjoin such mining, arguing that defendant's right was extinguished by a statute that banned mining where resulting subsidence would threaten residential property owned by another. The Court found that the statute cited by the plaintiffs could not be sustained as a constitutional exercise of police power, as it served only the private purpose of altering the bargain between the parties to the benefit of plaintiffs, and because of its extreme effect on the value of the defendant's property rights. In oft-quoted language, Justice Holmes wrote for the Court:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

[*Id.* at 413].

This paragraph should form the blueprint of any rule announced in this case regarding the proper level of scrutiny of the government's interest. If the government's action is for a valid public purpose and is reasonably exercised within its constitutional powers, the inquiry must shift to determine whether the effect on the property owner's rights is of such a magnitude that it is unfair to require the property owner alone to pay the costs of the government's exercise of its police power.

Focusing on the effect on essential property rights is fully consistent with this Court's precedents. In *Penn Central Transportation Co., v. New York City*, 438 U.S. 104 (1978), the Court cited several factors significant to the inquiry of whether a taking has occurred. The Court cited the economic impact of the regulation and the degree to which it interferes with investment-backed expectations. *Id.* at 124. The Court also cited the "character of the governmental action" as a factor, stating that a taking may more readily be found when the interference is comparable to a physical invasion than "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* The Court then reviewed a series of cases where government action reasonably characterized as in the public interest was found not to constitute a taking even though it had an adverse effect on "recognized economic values," *id.* at 124-27, and contrasted cases where such actions were found to constitute takings because of the magnitude of their effect on the use of the property or their characterization as "acquisitions of resources." *Id.* at 127-28. The analysis in *Penn Central* suggests that the key to determining if a regulation constitutes a taking is not a jury or court's view of the wisdom of the government's choices in "adjusting the benefits and burdens of economic life to promote the common good," but the degree to which the government's action is akin to a physical taking and the magnitude of its effect on the property owner's rights.

In *Agins v. City of Tiburon, supra*, 447 U.S. 255 (1980), the Court first used the term "substantially advance legitimate state interests" in dicta to describe one of the tests to determine if a regulation constitutes a taking. In support of this proposition, the Court cited *Nectow v. Cambridge*, 277 U.S. 183 (1928), which was a Fourteenth Amendment due process challenge to a residential zoning ordinance. In *Nectow*, the Court found that a restriction on the use of property violates due process if it "does not bear a substantial relation to the public health, safety, morals, or general welfare." 277 U.S. at 188. *Nectow*, in turn, was based on *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), also cited by the Court in *Agins*, 447 U.S. at 261, in which a residential zoning ordinance was upheld against a claim that the ordinance deprived the appellees of property without due process. In the portion of the decision cited in *Nectow* and *Agins*, the *Euclid* Court found that the reasons advanced for the ordinance "are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395. This conclusion suggests that the state-interest review set forth in *Agins* is based on a due process standard, and therefore that it should be as deferential to the government as the review applied in due process cases. See *Hodel v. Indiana*, 452 U.S. 314 (1981).[4]

This is not to say that the takings inquiry is identical to that applied in due process cases. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 n.3. In *Agins*, as in *Mahon* and *Penn Central*, an additional factor is added to the inquiry: the magnitude of the regulation's impact on essential aspects of a

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[4] In this case, the trial judge reviewed and rejected the plaintiff's substantive due process claim, finding that the city acted for valid regulatory reasons based on the conclusion of federal and state regulatory agencies that the environmental concerns posed by the project were not adequately resolved. (Pet. App. 41-42).

property owner's bundle of rights. Thus, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the validity of the government's interest in assuring public access to navigable waters was not questioned, but the government's action was found to go "so far beyond ordinary regulation or improvement for navigation as to amount to a taking." *Id.* at 178. The Court reached this conclusion because the government's action interfered with the petitioner's right to exclude others, which the Court viewed as a "fundamental element" of property rights, and because the government's action was found to be akin to an "actual physical invasion of the privately owned marina." *Id.* at 180. Accord *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (the legitimacy of the public interest behind the challenged statute and the means by which the legislature chose to address that interest were not challenged, but the statute was found to effect a taking because it eliminated all economically viable use of the property).

That the true focus of the takings inquiry has been the effect on property rights is further supported by the decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). In *Keystone*, another Pennsylvania statute aimed at protecting the public from coal mine subsidence was reviewed. This time, the Court found the statute to be a valid exercise of the police power. The Court reached to distinguish the statute struck down in *Mahon* with respect to the public benefit, finding a distinction in the slightly broader scope of the Act and the fact that "circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern." *Id.* at 488 (quoting *Block v. Hirsh*, 256 U.S. 135, 155 (1921)). However, the Court found no difficulty in concluding that the petitioners "failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases." *Id.* at 492-93. Perhaps the key to the distinction between *Mahon* and *Keystone* was not merely the

passage of time, but the Court's view of the magnitude of the effect on the property owner's bundle of rights.[5]

Several other takings cases provide ample evidence that the focus has been on the degree to which the magnitude of the invasion makes it akin to a physical invasion or totally deprives a property owner of an aspect of property ownership deemed fundamental. In *United States v. Causby*, 328 U.S. 256 (1946), the frequent passage of low-flying aircraft was deemed to constitute a taking. Although the Court did not question that "[t]he airplane is a part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment," *id.* at 266, the intrusion was deemed a taking because the flights were so low and so frequent that they directly impaired the property's owner's ability to inhabit the property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (explaining that the decision in *Causby* was based on the intrusion's similarity to a physical taking). In *Kirby Forest Industries v. United States*, 467 U.S. 1, 15 (1984), the Court found that no taking had occurred during a period prior to condemnation by the United States, because the property owner's ability during that period to use or sell the property was not abridged.

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[5] This proposition is supported by the dissent in *Keystone*, authored by Chief Justice Rehnquist and joined by Justices Powell, O'Connor, and Scalia, which strongly questioned the majority's distinction from *Mahon* with respect to the public interest served. *Keystone*, 480 U.S. at 510-511. Ultimately, however, the dissent was based on the view of those Justices that the majority erred in finding that the Act did not extinguish an essential aspect of the petitioner's property right. *Id.* at 520-521. Indeed, the dissent specifically points out that "[t]he similarity of the public purpose of the present Act to that in Pennsylvania Coal does not resolve the question whether a taking has occurred; the existence of such a public purpose is merely a *necessary prerequisite* to the government's exercise of its taking power." *Id.* at 511 (emphasis added).

In *Loretto*, which involved an actual physical invasion, the Court described the fundamental "bundle of rights" that could not be eliminated without just compensation. The Court noted that property rights generally include the right to "possess, use and dispose" of property. 458 U.S. at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373 (1945)). This bundle includes the right to exclude others and the power to control the use of the property. *Id.* at 435-36. This analysis was reiterated in *Lucas*, where the Court held that the deprivation of all economically viable use of the property was a fundamental interference that constituted a "taking," and in *Nollan*, where the Court stressed that the right to exclude others was an essential "stick in the bundle of rights" associated with property ownership. 483 U.S. at 831.

In short, although the Court has maintained that an analysis of the purpose and reasonableness of the government's action must be conducted in takings cases, its determination of whether a taking has occurred has consistently turned on the degree to which the government action destroys all or some of the fundamental "sticks" in the bundle of property rights. While a review of the public purpose and government interest is no doubt important, it is not properly viewed as a prong of the takings inquiry but rather as a threshold question which ensures that the government action is for a "public purpose" and that it is not so unreasonable that it exceeds "constitutional powers."

This approach will ensure that takings cases will be resolved with the appropriate deference to state legislative judgments and administrative expertise that is required by principles of federalism and separation of powers. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-41 (1984) (holding that the "public use" requirement is coterminous with the sovereign's police power, and that the Court "will not substitute its judgment for a legislature's judgment as to what constitutes a public use" unless palpably unreasonable). This Court has long recognized that the regulation of land use is an area

"peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508, n. 18 (1975); see also *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("Regulation of land use [is] a function traditionally performed by local governments"). This Court has also recognized that administrative agencies and legislatures should be afforded deference on matters within their expertise and authority. See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972); *Hawaii Housing Authority*, 467 U.S. at 240-41. Yet in this case, the Ninth Circuit held that the jury was entitled to credit the property owner's experts and discredit the conclusions of the responsible city, state and federal agencies regarding the effectiveness of the developer's mitigation plan in protecting the habitat of an endangered species. (Pet App. 18, 42). This standard for reviewing government action would permit federal juries to substitute their judgment for that of state legislators and executive officials, whereas the standard proposed by the state *amici* will afford appropriate deference to these officials while ensuring a fair inquiry into whether their actions require compensation to affected property owners.

The public interest analysis is not a "license to judge the effectiveness of legislation," *Keystone*, 480 U.S. at 487 n.16, and 511 n.3, or a means to allow a federal jury to intrude upon state executive and legislative determinations regarding the public interest. The issue is not whether a jury or court views the government action as the best choice, but whether the action is consistent with the Fifth Amendment's purpose of prohibiting government from asking an individual owner to bear a cost that in all fairness should be borne by the public as a whole. Because the Ninth Circuit permitted the jury in this case to reevaluate the wisdom of the government's action, its decision fails to afford appropriate deference to the government's determination of the public interest and should be reversed.

III. THE ROUGH PROPORTIONALITY STANDARD SHOULD NOT BE EXTENDED TO REGULATORY TAKINGS CASES IN WHICH NO EXACTION IS DEMANDED

The Ninth Circuit erred in extending the "rough proportionality" standard that this Court has applied in exaction cases to cases alleging a regulatory taking. This Court has only applied this heightened standard of review in cases where the government has used its power in an effort to exact a dedication of property from the owner in exchange for a regulatory approval. A heightened standard has been applied in such cases because, due to an exaction's similarity to a physical taking, the Court has viewed exaction as a means of avoiding the exercise of eminent domain, and because it implicates the doctrine of "unconstitutional conditions." The extension of this standard to regulatory takings is thus inconsistent with the purpose of the standard and fails to provide appropriate deference to the legislative and executive decisions of local governments.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the property owners sought to demolish a bungalow on beachfront property and rebuild a home on the lot. The Coastal Commission granted the Nollans a permit to do so, but on the condition that they permit the public an easement to pass across a portion of the property to the beach. The Court ruled that this condition constituted a taking. It reasoned that had the Commission ordered the Nollans to provide the easement, rather than conditioning approval on their cooperation, the easement would have constituted a "permanent physical occupation" comparable to that in *Loretto*. Because as a result of the easement, "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed," the fundamental right to exclude is destroyed, thus constituting a taking. *Nollan*, 483 U.S. at 832.

The Court then analyzed whether imposing the easement as a condition altered the outcome of the analysis. The Court

found that it did not because the public interests served by the easement were unrelated to any harm that might be caused by granting the Nollans' application. The Court reached this conclusion by finding that no nexus existed between the condition and the public interests asserted to support the government's action, concluding that the condition thus failed to substantially advance a legitimate state interest. *Id.* at 837.

The analysis used by the Court demonstrates why this level of review is appropriate where such a condition is exacted from the property owner, but not in the context of a regulatory taking. The Commission argued that the purpose of the condition included protecting the public's ability to see the beach, encouraging them to use the beach despite development along the shore, and preventing congestion at public beaches. The Court assumed, without deciding, that these were legitimate public goals. As a result:

> The commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless denial would interfere so drastically with the Nollans' use of their property as to constitute a taking. [*Id.* at 835-36].

Thus, had the government purposes been achieved through a regulation or administrative decision prohibiting the Nollans from pursuing their plan, the takings analysis would not have focused on the government's purpose, but on the degree to which its action interfered with the Nollans' use of their property. The addition of an exaction, however, caused the Nollan Court to delve into the government's purpose and whether the exaction was connected to achieving that purpose. The Court noted that a condition such as a height or fence restriction "that would have protected the public's ability to see the beach," *id* at 836, would be constitutional, but that when the condition is unrelated to the government's goals, "the building

restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

The opinion in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), also supports the proposition that the nexus requirement was specifically intended to apply only to exactions of fundamental property rights. The *Dolan* Court described the ruling in *Nollan* as follows:

> In Nollan, supra, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. [*Id.* at 385].

Thus, the nexus requirement is directly connected to the fact that in both *Nollan* and *Dolan*, the government was using its power to exact from the property owner an agreement to do something without compensation that would clearly constitute a taking if government stepped in and did it itself.

In *Dolan*, the city conditioned approval of Dolan's permit to expand the building that housed her business on the dedication of a portion of her property for a storm drainage system and a pedestrian/bicycle pathway. *Id.* at 380. The Court found that a nexus did exist between the dedication sought and the interests the government sought to preserve. *Id.* at 387. However, the Court went further and required "rough proportionality" between the exaction and the government interest, *i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. In *Dolan*, the Court found

that the dedication of a greenway was sufficiently related to flood control to justify a dedication, but that the requirement that the greenway be open to the public and that the property owner give up her right to exclude others from that portion of her property combined to render the exaction a taking. *Id.* at 393-94.

The reasoning in *Nollan* and *Dolan* does not support extending the rough proportionality standard to regulatory takings. If the government in either case sought to create an easement for access to the beach or flood drainage, it would clearly have had to pay the property owner for the property or the physical intrusion created by the loss of the ability to exclude others. It does not follow, however, that the government's action would have constituted a taking if a regulation had been passed, or a permit denied, prohibiting building that blocked public access to the beach or prohibiting building that interfered with flood drainage. In those cases, a taking would have occurred only if the regulation or permit denial resulted in the elimination of any economically viable use of the land or other drastic damage to fundamental aspects of the owner's property rights. Thus, the Ninth Circuit's extension of the *Dolan* rough proportionality standard to regulatory takings cases where no exaction is sought is neither supported by *Nollan* and *Dolan*, nor consistent with regulatory takings law generally.

CONCLUSION

For all of the foregoing reasons, the Ninth Circuit decision should be reversed and remanded.

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